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OBSERVATIONS

BY

Sir Laurence Peel, Knight,

CHIEF JUSTICE OF THE SUPRLME COURT AT FORT WILLIAM

ON

THE INDIAN PENAL CODE

AND THE

NOTES TO IT AND ON THE REPORTS THEREON.

CALCUTTA:

W. RIDSDALE, MILITARY ORPHAN PRESS.

1848.

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Observations by Sir Lawrence Peel, Kt., Chief Justice of the Supreme Court, at Fort William, on the Indian Penal Code and the Notes to it and on the Reports thereon.

The Code had been published in the *Gazette* with a view to further consideration some time before my arrival in India. I was not required, or invited as Advocate General to give any opinion upon it. The Judges of the Supreme Court had been invited to deliver their opinions upon it. After my accession to the Bench the subject seems for a long time to have been dropped. In consequence of having received from the Government in the vacation of last year, a Report of the Law Commissioners on the various comments to which the Code had been exposed, I was induced then to study the Code, and the notes to it, with more attention than I had previously bestowed upon them. The result of my examination of the Code was the conclusion, that its principles are in general sound, but its execution very faulty and that it needs a very careful revision. As a friend to Codification, I should regret to see a Code put in execution, the practical working of which would, I fear, not be favourable to the progress of legal reform in that shape. I have stated the grounds of this conclusion in a paper, which I then drew up, and which I annex to this Minute.

I pass over the introductory matters in the Report on which I have now the honor to observe, with the exception of that part which in pages 4 and 5, contains an answer to a judicious comment of the Governor General stated in paragraph 9. The Governor General in question was, I believe, Lord Auckland, and the observation bears the stamp of his practical character. Without meaning the slightest disrespect to the Law Commissioners, I must say that their answer to it savours, in my opinion, of sophistry. Lord Auckland says, the union of prosecutor and Judge is objectionable. They answer "the mind of the Judge ought

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not to be pre-occupied with opinions, respecting the matter which he is to investigate, acquired extra-judicially before the judicial investigation begins". But they style the opinion contracted by a Judge in his character of prosecutor, supposing the union of the duties in the same Officer, a provisional opinion, and compare it to that supposed to be formed in the mind of a Judge in the progress of any trial, whilst the case is yet but partly heard. If a bias should be formed in the latter case, it would arise in an unpractised judicial mind from the unavoidable priority, which must be given to one side or the other on the hearing: for the Judge cannot turn the allegations and the evidence on both sides into one simultaneous performance. But if a bias be formed, it is still an evil, though an unavoidable one: but because some evil must exist that is no reason for the introduction of more. It is moreover a fallacy to treat the preliminary proceedings of accusation and inquisition as "the beginning of the judicial investigation," meaning thereby the trial. It might as well be said the commission of the deed is the beginning of the judicial investigation. The preliminary proceedings are, in fact, distinct proceedings in furtherance of the prosecution. A Justice of the Peace, so long as he merely receives the accusation or puts the Police on the alert, suggests or orders the attendance of this witness or of that, or the following this or that clue to further evidence, is performing the office properly of a prosecutor. They are not judicial proceedings: where the English Law prevails, the Justice of the Peace, as has been decided, in pursuing such inquiries, does not act as a Judge; they are preliminary and necessary but not therefore part of the judicial proceeding in the sense of the trial, nor properly *the beginning of it*, for if a beginning they must be a part of it. The reasoning therefore whereby the Law Commissioners attempt to controvert the propriety of Lord Auckland's wise decision, that the union of prosecutor and Judge in the same Officer is objectionable, is not well founded either on fact or law, nor logically consequential upon the analogy brought to aid it. I have commented thus upon it, because the Law Commissioners, though submitting dissentingly to Lord Auckland's decision, yet in some degree form their plan of procedure on the principle which that decision condemns.

I shall confine my remarks to some portions only of the Sections headed Offences to be tried by Courts of Session in the Appendix to the Report: for my object is merely to suggest the necessity of further revision, which may be sufficiently shewn by observations on a part of the Report. In like manner I have limited my remarks on the Code to portions of it only.

The first point on which I shall touch is the examination of the defendant.

By Section 37, it is enacted, that the defendant *shall* be examined by the Court in the following manner:—I think there is a pedantry in enacting, that in every case the Court shall put exactly the same formal and preliminary questions upon the examination of every defendant. For instance that in every case a defendant shall be asked the name *of his father.* If the defendant be himself a person generally well known, why *must* this idle ceremony be gone through, which may be wholly useless even for purposes of identification. A defendant's identity may in certain cases be better known by reference to his mother than his father, as for instance in the case of some illegitimate descendants, or descendants whose fathers have not been known in the place: in such cases an inquiry as to the father's name, would be merely putting by compulsion an irrelevant question. I doubt the propriety of enacting here, that a *refusal* to answer on a preliminary inquiry, *without assigning a sufficient reason*, must operate as a circumstance against him. There would practically be little agreement, as to the sufficiency of the reason for being silent. Allowance must be made for distrust and jealousy on the part of the accused, especially when they are natives. They may fear to be entrapped. They may have ensnaring questions present to their thoughts. An innocent man may fear to disclose his case to an adversary, whom he may suppose capable of tampering with his witnesses, or buying them off; of intimidating them, of getting up a case in answer. Every Judge will form his own estimate of what is a sufficient reason for declining to answer, and according to their individual characters will be the conclusion. By the third Section it is directed that the following interrogatories *shall be put to them.* Where were you at the time of the act or omission of which you are accused, as stated by the witnesses to have taken place? The prosecutor's case and his witnesses are by the scheme to be first heard, (see Sections 36 and 37), and it is the common and natural course, for the defendant cannot be examined on an undisclosed case. In all those cases, and they are numerous, where the questions put by the prisoner, on cross examination, admit his presence at the time of the commission of the act to which a particular and a criminal quality is imputed, the question would have even a ludicrous character. In many offences of omission the proposed inquiry would be merely idle and irrelevant. It may be said they are harmless questions in every case, and may be useful in some. But if a Judge is fit to conduct the preliminary inquiry at all, to conduct the examination of witnesses, he must be certainly supposed capable of putting pertinent and necessary questions, if he be allowed to examine the accused. If the power of examining the prisoner be conceded, it should, in my opinion, be as unrestricted as the power to examine a witness, that is, unrestricted in pursuing the inquiry by consequent pertinent and relevant questions. As to the power itself, the wisdom of employing it depends, in my opinion, on extrinsic circum

stances. Abstractedly it may be conceded to have much to support it: but its success in the working of it will much depend on this, whether the exercise of it be in accordance with the spirit and habits of a people: whether that people themselves take part in the administration of the Laws: whether their spirit influences those who do administer the Laws: whether the Officers to be entrusted with its exercise are so well skilled as to know how properly to pursue so delicate an inquiry, whether they are able to make due distinctions between prevarication or falsehood and confusion, and due allowances for stupidity, perverseness, fear, jealousy, and other causes, which, although they might detract from the credit of a witness, that is, dissuade from a reliance on his testimony, ought not to prejudice a party especially on so vital a point. By this plan a power of examination of an inquisitorial character, and therefore likely to be odious, is introduced: it appears to me that the Commissioners, as if in fear of it, have so managed matters, as to render it highly probable, that the power would be at once odious and inefficient.

The sixth direction page XII. Appendix, appears to me to enjoin an inconvenient proceeding. A long inquiry must often take place before the Committing Magistrate, whether he will record a confession or not, and it should be remembered that the Court is merely conducting a preliminary Investigation.

It is directed seventhly, that if any writing, or any article of property be produced in evidence, it must be shewn to the defendant, and he must be asked whether he recognizes it.

Many writings and articles of property may be produced in evidence, which though they conduce to the proof of the case, yet may be utterly unconnected with the prisoner, and the question above stated would, in many cases be an idle question. What necessity can exist for making it a matter of obligation in the Judge to put this question as to every writing and every article of property produced in evidence?

Section 40. It appears to me that the Indictment should not be prepared by the Subordinate Court, but by the Court of trial. The former cannot be reasonably presumed to be so competent in this respect as the latter. It will not be an easy task to master the Code so as to apply it readily. The not apparent, but still not less real under-current of the English Law, which runs through it, would make it more easy to be worked by an English Lawyer, than by a Magistrate not professionally learned, though well versed in the Laws, which he has been hitherto administering. The junior members of the service will be called upon to execute the duties

of the Subordinate Court. They cannot be expected, until after some considerable training, to be able to frame an indictment with a correct reference to the particular provisions of the Code, to which the evidence most directly applies. And the purposes of justice do not in the least require such preliminary preparation of the indictment. As the Judge must examine the depositions and the indictment, to see if it be correctly framed, this task will have to be twice performed substantially without any necessity for that double labour. The accused will gain nothing by the communication of the indictment to him at this stage. He having been present, and having heard the depositions, will know what he is charged with having done or omitted to do : and it seems to me every way preferable that the Subordinate Court should simply commit for trial on the depositions, and state what is indeed tacitly understood—"you are committed on this evidence for trial to answer the charge preferred against you, in the form in which the Court shall direct that charge to be prepared." Under the English system, it is by no means obligatory to indict for the exact offence for which the party is committed, though the commitments being in general correct, deviations are rare.

The preparation of the indictment even in this scheme of comparatively simple procedure, would require some thought and care.

Section 41. I think that it should be compulsory on the Subordinate Court, to take the defendant's evidence, in the first stage, if he desires it. All unnecessary discretionary power in a Judge is an evil. It would tend in some degree to the advancement of justice, that such witnesses of the accused, as he wishes to be examined at this stage, should be heard, if they are in attendance, or easily to be procured.

Proper provisions may be easily made to guard against the delay of a prosecution by false pretences of witnesses to be examined for the defendant.

Section 42. This Section appears to me objectionable: why should a man be committed on a graver inclusive charge, when evidence at hand would clearly establish it to be the duty of a Court to commit for a minor included charge? Malice may keep back from the evidence on behalf of the prosecution, many extenuating circumstances, and the allegations of the defendant may not suffice to shew the true character of his act. He may be stupid, or obstinate, unaware of legal distinctions and modifications. It may appear otherwise than by the allegations of the defendant, or the evidence in support of the charge, that the prosecutor's case is overcharged, that there are such and such extenuating circumstances; and that witnesses may easily be produced for the defen-

dant to establish that such is the case. The Subordinate Court in such a case would not be enabled by Sections 42, 43, or 44, to hear such testimony, and to frame the accusation as it ought to be framed.

Section 47. It is not stated what is to be done if the indictment be vitiated: whether a remand on the old evidence, or an acquittal, or a remand generally, is to result.

Section 48. This Clause seems to me also objectionable. It proceeds on the assumption of a degree of knowledge of the Code, and of a general capacity in the defendant, not reasonably to be expected: and the Commissioners in framing it appear not to have had sufficiently in view circumstances common to many accused persons. First, as to the lists of witnesses. Both parties should be obliged to render such lists or neither. The prosecutor is not limited at the trial. He may call new witnesses. If the provision be merely intended to enable the defendant to subpœna his witnesses, it is clogged with hard conditions on him. It is not intended to limit him to the witnesses whose names he gives in ; and it would be exceedingly unjust to do so, for he might not know that witnesses existed capable of proving facts, which might tell in his favour. But he is to state the points, which they are to prove respectively ; this he would often have no means whatever of doing at that time, and variations between their actual statements, and his suppositions of their probable testimony would be turned to his prejudice. Such particularity would be objectionable even in civil procedure. Independently of this, the communication of their names virtually to the prosecutor might expose the accused to the danger of his witnesses being influenced, corrupted, or intimidated in the interim. Few accused persons could be expected to distinguish so accurately as to know when with propriety to plead generally, or especial exemptions and mitigations, or when to admit the facts, but deny their consequences. It seems to me unreasonable to insist on this from the accused at any stage, still less, that on this preliminary inquiry, he should unaided be required to take steps, which might possibly have a most important bearing on the result of the after hearing.

Section 51. As it stands is objectionable, because it would enable the Judge to break a compact, which the witness had entered into below, under which, as an approver as it were, he gave his testimony.

Section 53. The Judge should also communicate his own opinion, so that the defendant may elect, to pursue the obvious course, which in such a case, if he understood his own interest, he would adopt.

Section 55. Enacts a course of procedure too complicated; unless the Judge acts for the defendant, he will not know what to do. It proceeds on the assumption, as I have stated before, of a knowledge of the Code and its provisions. But it would be merely to repeat myself to observe further on this course. The course pointed out is logical enough: and is in substance oral special pleading applied to a criminal trial. But it is above the intellectual powers of most defendants.

Section 58. Let any one read this Section attentively, and ask himself, if many a Judge may not miscarry in it, and if many a defendant will not wholly misconceive the object of it.

It would often result, probably generally from the mixture of oral pleading and examination, that the Judge would have to try the case fully after all: not being able to elicit clearly "a particular statement of the facts, which the defendant intends his acknowledgment to embrace:" "not finding the statement consistent in itself," especially after testing it by interrogatories suggested by the evidence given before the Subordinate Court, which would have the effect of deterring the defendant from an adherence to admissions, which he might otherwise have been willing to abide by.

The observations I have already made apply in some degree to Sections 69 and 70.

The Section 63 seems to me, though framed in a commendable spirit, to be inconsistent with most that precedes. This implies the unfitness of most defendants to be trusted even to plead guilty, whilst the other Sections suppose a power of self protection not reasonably to be expected.

Section 68. The power of altering the indictment should be carefully guarded, or it may lead to terrible abuses. Material discrepancies (see Section 71) in statement are rather a ground for dismissing a charge, than for amendments in conformity to the last statement. Amendments on formal points stand of course on wholly different grounds. The defendant may be convicted on the amendment, as true, whilst it may be merely the blundering variation of a witness unable to tell a false story with consistency. The proper course is to remand for a new trial, by compulsory obligation on the Judge, giving to the accused ample means of meeting the charge in its amended form.

Section 72. This power ought to be independent of the discretion or permission of the Court. It should be of right, if claimed in time, just as the prosecutor's right is unrestricted. It is otherwise a most

material encroachment on the rights of the defendant: and inconsistent with the demands of justice. I have shewn that a defendant may know nothing of witnesses at the preliminary stage, whom he may desire to produce at his trial: and his power to produce new witnesses should not be dependent on the discretion of any man.

Section 88. This Section embodies an objectionable principle, as does the amendment of the indictment, in matters of substance. The just course would be to remand for a new trial on the *new charge*, for such in substance it would be. The defendant is placed quite at the mercy of his prosecutor and of his Judge. For the prosecutor may for the purpose of deception make his charge assume a certain form before the Subordinate Tribunal. The defendant may prepare himself for that. But at the trial the prosecutor may prove a different case having different results, and prove it either by additional or by the old testimony. It is not compulsory on the Judge in such a case, on the defendant's demand, to say this case cannot be supported, you must be proceeded against anew on the case now disclosed. He may amend the record, though on substantial matters, and then if it please him, proceed to trial and conviction of the defendant. He has *in the exercise of his discretion*, a power to do the defendant justice ; but he is not obliged to do so: and the Law ought to oblige him to do that which it is just that he should do. The forms of the indictments and sentences, &c., might, I think, be simplified, but I see no objection to them.

I annex some observations on some parts of the Code itself, which my late perusal of it led me to make.

OBSERVATIONS ON THE INDIAN PENAL CODE.

The first and prominent defect in the Code as promulgated appears to me to be the so-called illustrations. Illustration of a Law by the Legislature which frames it, may be viewed as an admission that they want the skill to make their Law speak for itself. But the Indian Legislature is not *inops consilii*, and cannot plead that reason for an illustrated Law. The illustrations annexed to this Code would not, in my opinion, taken as a whole, assist the interpreters of the Law. I think it would be wiser to pass an unillustrated Code, than one thus illustrated. If, however, it be passed so illustrated, I think these illustrations should not be authoritative, for then it would be competent to no Judge to pass by an erroneous illustration.

The objections, which I have to state to the illustrations, are, that many are useless, offering light in broad day: that some darken whilst they attempt to give light: that some do not throw the light where the darkness prevails: that some are *ignes fatui* to mislead: that some are trivial and bordering even on the ludicrous: and a very few are open to more serious objections. It would be insufferably prolix if I were to go through the whole of the illustrations, to prove the correctness of my opinion of them. I shall give, however, several examples, which I have selected as fair samples of the general quality of a large part of them.

The illustrations I consider more defectively worded than the Code itself, which, however, appears to me to be in many parts expressed without a due attention to precision; and often to use words of too vague an import to be the proper vehicles of the meaning of Law-makers. The chief objections to the substance of the Code, which I have to offer, are the following, the great, and as I think, needless multiplication of criminal offences, many of them directed against acts of the most trivial nature: enactments creating needless difficulty in the application of Laws by the vagueness and generality of their language, and giving a needlessly wide scope to the discretion of the Judge, and to his exposition: enactments needlessly creating fictions and technicalities. I shall not attempt to go through the whole Code, though I have examined the whole: my observations to be read must be limited in length, and I shall select in the same spirit as I notice some illustrations, some

parts only of the Code for observation. As the illustrations especially, if authoritative, would deeply affect the substance of the Code, I shall first address my observations to them. In Chapter I. Title General Explanations. The Section 3rd, wherever the causing of a certain effect, &c. &c., is thus illustrated.

Illustration (a)—A digs a pit, intending, or knowing it to be likely, that he may thereby cause a person's death; B puts turf over the mouth of the pit intending, or knowing it to be likely that he may thereby cause a person's death. Here if Z falls in and is killed, both A and B have committed voluntary culpable homicide. Nothing is stated in this illustration from which any union of any kind between A and B can be inferred except that each does something with a certain evil intent, or evil knowledge, at one and the same pit, which pit occasions a death. But that alone is not enough, unless it could be supposed that the Law Commissioners meant by "jointly causing that effect," causation of different effects, for a pit turfed over is a different effect from an uncovered pit, and it is capable of producing under certain circumstances consequences which might not result from an uncovered pit in the like circumstances: and if distinct and unconnected acts, of different persons at different times and stages of completion on one object with different results, which object in its finished state is the immediate instrument of mischief, but without at any time any common design between the different agents, and without knowledge of each other or of their respective objects, were intended to constitute *joint agency in them in doing the* completed thing, I should have expected to find in the Code some expression of an intention so to alter joint agency as commonly understood. If expressed and enacted such a joint agency would have been technical and a fiction. The illustration errs therefore from want of precision and of connecting links.

The 2d errs through redundancy, for though no concert of any kind is expressed in terms between the two Gaolers; yet from the very circumstances predicated, *concert between the two to effect the same end by the same means* necessarily results, for how could one Gaoler, by an omission for his turn to supply food without knowledge that his successor would be equally criminal, know that death would result? and independent unconnected criminality could not be rationally supposed under the circumstances stated. But if it was intended so to narrow joint criminal agency as to make it mean concert between two or more to effect the same end by the very same means it would, I think, have been openly expressed. To construe the rule aright therefore, both illustrations must be passed over, and the rule itself solely attended to. The rule, though not quite accurately framed, is much more correctly framed than

are the illustrations. That the rule is not accurately framed appears from this: Take culpable voluntary homicide *as the offence* as in the first of these two illustrations: then digging a pit and turfing it with the intent or knowledge supposed; though *the effect caused* with the intention or knowledge supposed, and though an offence, is not *the offence committed*, when a charge of *culpable voluntary homicide* is under consideration, whereas the rule treats the causation of a certain effect with a particular intent, or knowledge, as the consummation of the offence in all cases to which the rule would apply, though in some that and the happening in fact of a circumstance, which might have been foreseen, are necessary to constitute the *offence*.

Clause 1, Section 20. "A person is said to counterfeit, who causes one thing to resemble another thing, intending to deceive by means of the resemblance. *Explanation.* It is not essential to counterfeiting that the imitation should be *exact*."

ILLUSTRATIONS.

If the embellishment of a coin be a wreath of *forty* leaves, and the inscription be King William, a person counterfeits that coin, who, with the intention to deceive by means of a resemblance, makes a coin with a a wreath of *thirty-nine leaves*, and the inscription King *Wiliam*.

The illustration of "the explanation, that it is not essential to counterfeiting that the imitation should be *exact*", states as instances, errors, which might escape even a vigilant observer, especially the first. It would have been better to state much grosser errors, and to *illustrate* by shewing that, if there were *a resemblance*, such as to furnish evidence of an intention to deceive by reason that *it might deceive* where it was meant to be used for purposes of deception then the counterfeiting would not be incomplete, though the resemblance might be very imperfect; for that is the true construction of the rule, and its obvious sense. P. 15. The illustration might lead some people into error as to the degree of perfection of imitation necessary to a "resemblance".

CHAPTER III.

GENERAL EXCEPTIONS.

Section 62. It is said nothing is an offence, which is done by a person, who is, or *in good faith believes himself to be*, commanded by Law to do it. The rule requires *a belief in good faith*, not of course a simulated belief. The dark part requiring illustration, is the sense of the words "belief in good faith". The illustration is of a case in which the Officer is led into a belief, &c.

Let it be supposed that the Officer under circumstances suggestive of grave doubts upon the point of identity grossly neglected to avail himself of sure means within his reach of satisfying himself, that he was about to arrest the right person. The question would then arise "is this belief in good faith," he would not, under such circumstances, act with good faith to those employing him, who would expect that he would not by gross negligence cause a grievous wrong, and expose them to liability in a civil action. The belief might be sincere, but in forming it he would have committed a breach of duty, and would have acted towards his employers in breach of the trust reposed in him by them. The means are not stated whereby the Officer is supposed to have been *led* into error, nor can one collect whether circumstances or persons are supposed to have led him into that error. The illustration is, but an echo of the rule, and does not solve the real difficulty, viz., what species of belief was intended under the terms "belief in good faith," whether simply *belief in fact*, sincere belief as distinguished from feigned belief; or belief formed honestly, that is under circumstances of good faith in all that led to the formation of such belief.

The like observation applies to the next illustration and rule.

"Judgment exerted in good faith" presents the only difficulty. And the illustration merely on that point echoes the rule, and does not shew in what sense the framers of the Code used the words "judgment exerted in good faith." The two illustrations to exception 69 are useless, and as they border on the ludicrous, would be better omitted.

The exception 71, is stated thus;—"nothing *which is done in good faith for the benefit of a person*, who is under twelve years of age by his lawful guardian or guardians, or by the authority, &c."

Fourthly. This exception shall not extend to *Rape or the gratification of unnatural lust.* Is it necessary to do more than point out the words of the exception and proviso underlined, to shew how objectionable the last is. A guardian alleging that he suffered such abominations to be practised on his ward *for the benefit of the latter in good faith*, would, I trust, be heard by no Court of Justice in the world without the *liberrima indignatio* appropriate to such effrontery. The illustration (e) and——are also very objectionable. It is assumed in one that a father, without any other cause, than merely the pecuniary benefit of the child, could *bonâ fide* in good faith emasculate the child for the child's benefit; in the other, that a father abetting another person in a rape on the father's own daughter merely for the sake of money for the child, could *bonâ fide* in good faith, do that act for the benefit of the child. If any wretches, in fact, entertain any such ideas, a Legislature should not notice them except to mark its reprobation of them. If money, *under such circumstances*, could, with any propriety, be termed benefit, the balance surely is to be cast between the good and the evil in estimating the benefit as well as the good faith of the transaction: the rape, the emasculation, or the other abomination, against the mere money for the infant. The rule says not "for the supposed benefit," but absolutely "for the benefit;" not what some wretch might possibly deem a benefit, or evasively assert he did so deem.

Section 73. The illustration here refers to Clause 316, and it says that A's act falls within that definition. But if the terms of that definition be referred to, the definition is of an act done with the intention of thereby causing hurt to, or with the knowledge that he is likely thereby to cause hurt to, &c., or the omission of what he is legally bound to, with the like intention or knowledge. But the illustration is consistent with the absence of both the intention, and the knowledge required to constitute the offence described in Clause 316. It would startle a person accustomed to travel in public carriages to learn, that a man getting into a public carriage in which another is seated, and in seating himself hurting that other by pressure, offended against any Law. The Code does not in fact so enact. It is the illustration which implies that the Code so enacts. A man may get into a public carriage in which another, or others, is, or are, sitting, and in seating himself may hurt another, or others, by pressure, without either intention to do hurt of any kind, or without knowledge that any such mischief may result, and without the omission of any obligation, legal or otherwise.

The illustration (b) is also defective for the term fraudulent is used in the definition of theft in this Code, and a servant, who dips a pen

in his master's ink to write a letter, would in most such cases take it not fraudulently, but by presumption of a license reasonably made.

Section 75. Of the right of private defence.

ILLUSTRATION *a*.

Z, in this illustration, is not shewn to be legally competent to arrest A, if the meaning of the language be that Z arrests A without any suspicion in any quarter of A, and without believing that any suspicion of A exists. The illustration leaves it doubtful what is meant by maliciously arresting A, not having any ground to suspect A, &c.

An Officer, who has authority to arrest under given circumstances, or at given times, or at definite places only, cannot, with any propriety, be said to be "competent to arrest" generally. A proper illustration of the rule could have been easily given: if the rule was intended to bear the meaning which its words import. And if the rule was intended to mean that an Officer with a limited competency to act, must for the sake of public tranquillity not be resisted at all, then the illustration should have been very differently worded.

The next illustration is almost ludicrous by reason of the disproportion between the one who does the harm, and him who suffers it; and the illustration does not explain what degree of unnecessary harm takes away the protection afforded by the right of private defence.

Having noticed some of the illustrations I now proceed to remark on the substance of the Code, reserving further observations on the illustrations.

CHAPTER XII.

OF OFFENCES RELATING TO COIN.

This Chapter (*i. e.* as originally framed) is most defective.

The Law Commissioners in their second Report propose many amendments of it. On a former occasion I pointed out its defects, when it was proposed to detach it from the Code and pass it as a general Law for all India. Most of the defects I pointed out are proposed to be remedied, but with those proposed alterations the Law would still be defective. I shall notice the second Report in conjunction with this Chapter.

In the 208 paragraph of that Report, the Commissioners appear to have forgotten, that my remarks were only on the Draft Act separated from the Code. The Law of Abetment, as stated in the Code, would not have affected that Draft Act if passed into a Law then; for it was then proposed to enact it as a distinct legislative measure, and therefore it is no answer to my objection which pointed to that draft, and not to the Code, to state that the Code in its Law of Abetment supplies an answer to my objection.

In Section 209 of the Report, the meaning of my observations is misunderstood.

They had no reference to any offences proposed to be enacted, but to an apparent assumption of a position of Law, as to depreciated currency in general, which I thought not settled as a position, but deserving to be so by distinct enactment.

On very few and trifling points, however, do the Law Commissioners appear to me to have mistaken my meaning.

The 198 paragraph of the Report appears to me to contain no answer to my remarks, which were to this effect, that the possession of implements for counterfeiting when brought home to a party proved him commonly to be a coiner, and therefore that the English statute was a more reasonable Law in this respect than the Draft Act would have been on this point, if enacted. Implements for coining in India in the hands of a coiner, would most generally, I conceive, be used for coining here the coin most current here; and it would rarely happen that they would be used in India for coining coins not current here as coin—and the use of many such implements is readily transferred from coining one sort of coin to coining another sort, and therefore I still think that Law would be an unwise Law, which should enact, that if men were intending to coin Queen's, or Com-

pany's coin, and had the fire, the implements, the metal, the alloy and all else ready, but were disturbed and apprehended before the actual counterfeiting began, they should be subjected to a minor term of imprisonment merely by reason, that the coining was only inchoate. The Law would be strangely inconsistent with itself on this point, it would say that if a man is a coiner of foreign coin in India, it shall be the same thing as to punishment whether he is detected in an earlier or later stage of the act of coining ; but that if he is a coiner of coin of the state in India, a distinction shall prevail in this latter case, which is repudiated in the former paragraph 202. I did not deny the propriety of a distinction between the " common utterer" and another utterer.

The distinction itself was of course too familiar to be overlooked, and I never doubted its propriety. But I did object to the contemporaneous knowledge as the ground of distinction, and I still think it an inconvenient and unwise one. It may very well happen that such knowledge may exist with perfect innocence of intention at that time, and on the other hand the necessity of establishing a contemporaneous beginning of *possession* and *knowledge* in the case of many a common utterer may surround a prosecution with needless difficulties. How defectively these Sections 240 and 241 are worded and proposed to be worded will appear from this consideration, that if one became possessed of base money knowing at the time that it was base, but without any intention then of putting it in circulation, and afterwards he did put such counterfeit coin in circulation, but without any fraudulent intention whatever, as for instance accidentally and by mistake, his case would be within the words of the Law: for he would certainly deliver such counterfeit coin with the intention that such counterfeit coin would pass as genuine, for he would then believe such counterfeit coin to be genuine, and intend to pass it as genuine, his former knowledge of its base quality having departed from him. If the words with a fraudulent intention, or the like were simply annexed to the delivery, the Law would be more correctly framed, and no Judge or Jury would be required to find as a fact, that on which he or they could merely speculate, viz., the utterer's intention as to the future circulation of the coin, after his own act of putting it off fraudulently.

The Law Commissioners propose to take the sort of uttering known by the name of ringing the changes out of the Law as to uttering base coin, and to rank it under the head of a cheat merely.

But no reason is assigned for this anomaly, as it would be in a Code having a distinct chapter for offences as to coin, and since this mode of uttering is, I believe, never resorted to but by common utterers, there is the less reason for the removal of the offence from its most appropriate chapter in the Code.

CHAPTER XV.

OF OFFENCES RELATING TO RELIGION AND CASTE.

I doubt the propriety of having a distinctive class for these offences. They may be well included under the chapter relating to criminal trespass and criminal annoyance. The very term religion in a Criminal Code is calculated to inspire false ideas; and some people may think the name of religion profaned by any connexion with caste. The scruples of some conscientious people will be offended, which consequence might be avoided if these offences were treated in terms as well as in substance solely as offences against public order, and were suffered to fall undistinguished by any peculiar prominency, into their proper places under appropriate chapters of the Code. Offences against God and offences *against religion* are commonly understood to mean the same thing, and as the former ought never to be subjected to punishment by human Laws; the use of a phrase is to be regretted, which might lead to the supposition that the state was punishing offences against God, an erroneous supposition, but one which the distressing vagueness of the language of the Code occasionally has a tendency to create.

This Chapter has one Clause (282) which, in my opinion, is founded on a false principle of criminal legislation. It punishes injuries to religious feelings, irrespectively of any evil consequences to the public tranquillity likely to result from such injuries. I think such injuries should not be regarded as crimes, unless consequences injurious to social order are probable consequences of them. I see no reason for making a distinction between religious and other feelings. It seems to me to be the duty of a legislative body, whilst it provides for the security of the public peace, by Laws repressive of such insults as are likely to provoke a breach of it, to inculcate at the same time sound and liberal notions on subjects on which much and mischievous error exists. People should be taught that they should be as tolerant of differences of opinion on religious as on other subjects: that it is not necessary that they should arm themselves to wage war for the Almighty, that derisive arguments are

not irreverent, if instead of being aimed at the Almighty and his wondrous works and ways, they are directed only against false estimates of them, that their feelings on religious subjects so far at least as they affect others, should be kept as much under their controul as their feelings on merely political, economical, or social subjects: and the legislature should not indirectly recognize the superior claims to indulgence of anger sanctified by a plea of religious excitability. Every insult offered to another with an intent to provoke him to a breach of the peace, or done with the knowledge that such a result is probable, should be punished; it is not certain that a man will be most insulted by taunts aimed at religion, and unless some limitation of the kind I suggest be adopted, some most trifling matters will be made the subjects of criminal visitation. It may be said every deliberate attempt to wound a man's religious feelings, must be presumed to be calculated to lead to a breach of the peace. I think there is no ground for making any such presumption: and the Law is too apt to conjure up imaginary dangers. Libels on the living and the dead are declared to be indictable offences by the English Law, by reason of their tendencies to a breach of the peace. This I consider to savour somewhat of refinement though I think that both classes of libel, when they cast very serious imputations, should be punishable criminally.

The Sections 275, 276 and 278, are objectionable by reason of the vague, general and undistinguishing language of them; they embrace offences differing very widely in their mischievous consequences. By the establishment in the one case of a minimum term of imprisonment of not less than one year: and in another of a minimum term of imprisonment of not less than six months, some very trivial offences would be subjected to far too severe punishments. Some illustrations will be furnished of this hereafter.

Some offences under Section 276 may be much lighter than some under Section 278: and the words of the latter might embrace acts not worthy of criminal visitation at all; as for instance reading a notice in a church in certain cases.

Clause 275. A person or persons may defile or damage or destroy in secret "an object held sacred by some class of persons," with the intention of thereby *insulting the religion* of that class of persons: yet without the slightest intention of annoying *any person* professing that religion. For instance, the Scriptures of the Christians, might in a secret society of a few unbelievers, be treated with gross indignity merely to vent their contempt for a religion in which they did not believe. No benefit to the public could result from visiting, as criminal, such secret

deeds, if casually discovered. The insult in such cases is avowedly to the *religion*, the perpetrators of such shocking indecencies might be incapable of wounding the religious feelings of individuals, and of doing any thing to shock other people's feelings, either from a general tolerant spirit, or from a sense of the social advantages which may be derived from a religion though false. If one should throw a Bible, or the Koran into the fire in secret, to mark his contempt for it, and the religion founded on it, he would destroy an object held sacred by a class or classes of persons with the intention of thereby insulting the religion of such class or classes of persons; yet it would be difficult to bring such an act within any rational principle on which Penal Laws should be built. It would not rank under " Incivisme" ; and if such an act done in secret, and without any probability of discovery were punished at all, it must be punished as impiety, as an offence against God. It is very possible that the framers of the Code would not intentionally have made such secret acts crimes; and that they may mean by an insult to religion, no more than an insult to a person or persons professing it. But such a construction could not be put on this Code, which has in other parts appropriate phraseology to express the latter meaning. The disturbance to an assembly engaged in the performance of religious worship, which is accompanied by an assault, or by the threat of one or by a manifestation of one intended, is an annoyance not necessarily greater than a disturbance without such accompaniments. One who runs into a place of worship, where persons are engaged in worship, and in a frolic pulls another person rudely by the arm and runs out, may thereby cause disturbance to the assembly there assembled and engaged; but not to the same extent as he would who should continue rudely interrupting the performance by noise, and profane talk, or songs. There is danger lest by legislating pointedly upon certain superstitions, superstition be confirmed and rooted in the minds of the ignorant.

The words of the Code as to sitting Dhurna, &c., go much farther, than the repression of practices of this kind as annoyance requires. They are large enough to embrace and would embrace, curses deliberately uttered under a mistaken sense of their efficacy, under a mistaken sense of duty ; under a mistaken sense of religion. There are yet many persons, who believe in the efficacy of a father's curse against his grossly offending child: many who believe in the efficacy of a widow's curses against the oppressor of the widow and the fatherless: many who believe in the efficacy of curses and imprecations by priestly authority. I know not whether it was intended to suppress these or any of them by making them criminal offences. But the words of the Code are quite ample enough to embrace them, for by Section 283, it would be enacted that " whoever does any act with the intention of causing it to be believed *in*

any quarter, that by doing that act he renders some other person an object of divine displeasure," or threatens any person with doing any act, &c.

Cursing a person with that intention, is doing an act: and most persons, who exercise this power, think and wish it to be thought in some quarter or other, that by their curses they render the person cursed an object of the divine displeasure. It is greatly to be desired that wiser views should prevail on these subjects, and that these denunciatory practices of one weak erring being on another should fall into disrepute generally. But I doubt whether legislating and legislating so severely would not do more evil than good. Sitting Dhurna when an annoyance, would fall under the head of criminal annoyance. It may not be useless occasionally to test the Code, by illustrations.

By Section 282. Whoever with the deliberate intention of wounding the religious feelings of any person, places any object in the sight of that person &c.

ILLUSTRATION.

A, a Christian, invites B, a Jew, to dine with him. A, with the express intention of annoying B, of insulting him as a Jew, and so of insulting his religion, and so of wounding his religious feelings, places in sight of B on the dinner table, certain articles of food, deemed by the Jew unclean. B, who is a man of sense, perceives them, is conscious of the intended insult, takes no notice of it, and feels merely contempt for his host, which is shared by the few guests present. A would be guilty under the Code of a criminal act for which he would be liable to be imprisoned for one year. The exigencies of society do not require that such trifling injuries as these when committed in private, and when attended with no danger whatever of public disturbance should be treated as criminal offences.

By Sections 275 — 276. A, convert from Hinduism to Christianity, conscientiously destroying in secret an idol of his own, which he has ignorantly worshipped—and having the knowledge that other Hindoos *are likely to consider* his conscientious act *as an insult to their religion*, may for this act of conscience done with no intent to wound the religious feelings of others, be liable to be imprisoned for seven years, and cannot, if convicted, be imprisoned for less than twelve months.

This certainly was not intended. It is, however, plainly within the words of the Section.

If the work of limitation by construction on general words clear in themselves is begun, where is it to stop? and will any two Judges limit the Law exactly alike?

Again damaging and defiling are of various degrees, some slight, easily reparable, and causing little annoyance in fact. According as such things are done by adults or children, by many or few, are the degrees of offence taken, of danger, and of criminality. A mischievous school boy running into a house of public worship, and thereby disturbing voluntarily an assembly lawfully engaged in the performance of religious worship by a trifling assault, may for his idle mischievous frolic, for which he may deserve a whipping, or other similar correction at the utmost, be liable to be imprisoned for three years, and must, if convicted, be imprisoned for six months. It would be tedious to multiply cases. Many more of the like kind may be put.

If the Legislature think it right to embrace in one prohibitory Law offences varying so greatly in degree, and some of which are of so very trivial a character, it should not establish a minimum of punishment, unless that minimum be little more than nominal.

By Section 280. "Whoever with the intention of wounding the feelings or insulting the religion of any person commits any trespass on any place of sepulture," &c. These words include acts which do not necessarily violate the feelings of the friends of the departed, nor desecrate a place of interment, acts not aimed against religion at all. Places of sepulture may be either private or public. Let us select the case of a public place of sepulture. Any unauthorized erection or a tomb there is a trespass committed on the soil.

ILLUSTRATION.

A, the wife of B, dies and is buried in a public place of interment. B is about to erect a monument to her memory there, with an inscription in verse on it. C, an enemy of D, the Medical man, who attended A, has persuaded B that but for D's mismanagement of the case, A would be still alive, and C with intent to wound. D's feelings engraves with B's concurrence two additional lines on the monument, the meaning of the lines is, that the departed thanks D for her speedy release. The authorities deem the inscription libellous and refuse to allow it to be put up. B and C put it up without authority and commit a trespass. This may be defamation of D in his calling, but it is hardly appropriately placed under a Head of Law relating to offences against religion or caste.

The feelings of people, about the bodies of the departed vary much. Some may entertain most fanciful notions about violations or desecrations of a place of sepulture. The persons entertaining these feelings may have no connexion of any kind with, and in fact be entire strangers to the departed. One who may think that foolish and romantically absurd notions are entertained by a particular person on the subject, may intentionally wound the feelings of that person by committing a trespass on a place of sepulture, but it may be a trespass of the most trifling kind, which ought not in its own nature to have caused more than the very slightest displeasure. The propriety or wisdom of the feelings, or their being commonly entertained or natural, signifies nothing; if a deliberate intention to wound them such as they are exists.

By Section 285. Whoever intentionally causes any food belonging to any person to be in a state in which that person, according to the rules of his religion, or caste, cannot use it as food, shall be punished with fine, which may extend to fifty rupees.

ILLUSTRATION.

A and B, both Catholicks, are breakfasting together on a particular day, on which according to the rules of their religion, as practised by some Catholicks, Catholicks cannot take milk for sustenance. B observes and practices these rules. A, in a frolic, but intentionally, pours some milk into B's tea. B empties his tea cup into the slop bason, and fills another cup with tea, and finishes his breakfast. The next day A and B quarrel, and B prosecutes A for the said offence.

If this Law stand at all, it should be limited to natives: for from them only can consequences injurious to public order be expected from the commission of such acts.

In Chapter 18, under the head of wrongful restraint.

Section 330. Every trifling, temporary obstruction of the private right "of proceeding in any direction" is made a crime. The most trifling interruption by locking a door and keeping it locked becomes a criminal offence, and acts, for which prosecutions by civil action would be deemed vexatious, become crimes.

ILLUSTRATION.

A contracts with B to rent a room in B's house. It is part of the contract that A should have the use of B's kitchen at stated times. On one occasion a servant of B shuts the kitchen door in the face of a

servant of A proceeding rightfully in that direction to use the kitchen for his employer A, and locks it and keeps it locked for a few minutes, until on a representation and complaint to the master all is set right. This constitutes a criminal act in B's servant, and if another servant of B opens the door to prevent their master from finding it locked, he becomes a criminal also, as a subsequent abettor.

The Chapter 19, entitled offences against property, calls for a more extended examination. An imputation of theft leaves a deep stain upon character, but of robbery one still deeper. This Code proposes to make the fraudulent acquisition of even the temporary wrongful use of property, by taking or moving it, theft. Under this Code the original intention to restore the property to the owner immediately after the unlawful use, would not the less make the above fraudulent acquisition a theft. I shall illustrate the proposed law in the manner already adopted.

A, a Lady, desiring to be distinguished at a ball, wishes to wear her friend B's diamond necklace there, B's diamond necklace is in the custody of B's maid, C. A knows that B will not lend her the necklace for that purpose. A therefore determines to carry her object by deceit practised on C, she accordingly tells C falsely that B has lent A the necklace, and obtains it from C, wears it at the ball without any injury to it, and returns it the next day uninjured. A under the Code has stolen B's necklace, and if C finding out afterwards that she has been deceived, conceals that matter from her mistress, and puts the necklace back merely out of a good natured desire to screen A, C becomes guilty of abetment of theft.

A, a youth, wants to ride a horse of his father, B, a hunting, B objects. B orders C, his groom, on no account to let A ride the horse. The next morning B is called away early from home on business of importance. It is a hunting morning. A man comes in to C with a message as he says from B that A may ride the horse hunting; the message is false and the contrivance of A. A rides hunting, and comes back with the horse, which is no worse. B returns home and finds out what has happened, and is about to chastise A for his fault, but B's neighbour, D, tells him that the less noise he makes about the matter the better: for his son is "in the Eye of the Law" a thief. If the man who lends the horse, being out of good nature merely desirous of screening the boy and of preventing a discovery, wash its legs, and dress it, he is guilty of subsequent abetment. The following is an illustration in the Code itself. A puts a bait for dogs in his pocket, and this induces Z's dog to follow A. Here if A's intention be fraudulent to take the dog out of Z's possession

without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

I have heard that it is a practice of Burglers to decoy away a watch dog, by canine bait of the female sex in a certain condition. This might properly be visited with punishment as an attempt to commit a theft. But let us consider other cases of temptation of the like kind, whenever frauds not of the like kind are in view. A wishing to improve his breed of dogs by the use of a dog of B's, which use he knows that B will not permit, bribes C, B's dog keeper, to let him, A, entice away the dog, in the way above stated. C consents and is bribed. A brings the female, as soon as the dog perceives her presence, and moves off from B's premises in the direction that A requires; A has stolen B's dog.

The same Law may be stated as to stallions, bulls, &c. A servant having charge of a stallion used to cover for hire, may be induced by a bribe to let the possessor of a mare, move the horse out of the possession of the syce by attraction of the mare in the direction he wishes the horse to go; in such a case it would not be easy to procure a conviction by a jury, of theft. Under the head Robbery, a still graver offence, a mere fraudulent abuse of civil process of arrest would become in certain cases robbery!

Fear of the wrongful restraint of another, is a sufficient fear, false imprisonment is a wrongful restraint of the person, and an injury: claiming and obtaining money to release a person from that state actual or pretended is extortion—"Extortion may be robbery," if it be threatened that unless money be delivered under such circumstances of presence and intention and knowledge as are requisite, instant restraint of the person of some body will ensue: and that fear induces one to avert that consequence from himself on another.

This may be done by one paying a legal just demand on a Writ legally sued out, but fraudulently abused in its execution; without, however, any intention in such fraudulent abuse of misappropriating the money received: and with a right to receive that money under the Writ but for such abuse. Thus may a Sheriff's Bailiff be made a *robber*, when he thinks he is only guilty of sharp practice. He would properly be punishable for abuse of process.

ILLUSTRATION.

A is an extravagant and much indebted man. B is one of his creditors. A owes B a sum of money small in A's eyes, but large in those of B. B wants his money and is much distressed for want of it.

He has often asked A for it in vain. B to get it resorts to stratagem. The debt is not to a bailable amount. He sues out non-bailable process on which A cannot be arrested, and with a Bailiff privy to and a participator in the stratagem lies in wait for A. A is ignorant of the Law of arrest. B and the Officer fall in with A and C, his companion, also ignorant of the Law of Arrest. B and the Officer go up to A, and the Officer shews and is about to serve his Writ when B says, you had better pay me, if you don't immediately pay me you will be instantly arrested and taken to prison, and threatens instant wrongful restraint of the person. C in fear of this instant wrongful restraint so threatened and to prevent it pays the debt to B. B and the Officer are robbers. For the person paying is put in fear of instant restraint to his friend, which would be wrongful restraint if executed; and pays under that fear: and it is not an ingredient in the Law of Extortion, that the person from whom the money is extorted should know at the time that it is an extortion, that would narrow mischievously the Law of Extortion: and accordingly the Code wisely provides otherwise.

The observations which occur in a subsequent part on the provision "that a collection of persons cannot be defamed" in some measure apply here also.

The Code does not define what shall "constitute a collection of persons." "The Union Bank" is in every body's mouth when they mean to speak of that community. They never trouble themselves about trustees, or servants, &c., or individuals in speaking of business with the Bank. One says my Government paper is pledged and in the hands of the Bank: the Union Bank has possession of my title deeds: I have lodged my policy with the Union Bank, &c., why should that which is real give way to fiction: why should the Law say that the Bank is not possessed when every man of business says it is? It may give rise to difficulties. There are kinds of property belonging to bodies to which it would be difficult to assign correctly individual custody or possession. The trustees are not known to every body, and it may give needless trouble to ascertain who they are. I think it would be a much more rational course for the Law to use the popular mode of description in such a case. Why must a lunatick's pocket handkerchief picked from his pocket, be treated by the Code as in the possession of his guardian? Why must fact give way to fiction, and no possession be recognized but what is possession "in the eye of the Law" under the Code. This, also may occasion difficulties: It is much more likely to cause difficulty than to facilitate proceedings, and savours in my eyes of "technicality."

It is an unnecessary addition to the definition of theft of an animal, that it must move in the direction *in which the thief wishes it to go*. This provision may give rise to difficulties.

ILLUSTRATION.

A is suspected of intending to steal B's sheep on a particular night, on that night B's servants C and D watch. The night is dark. The sheep are in a large compound, or other enclosure, to which the only exit or entrance is a gate. A comes and unfastens the gate, and throws it wide open, and leaves it so open, and then goes in the direction of the sheep. He has dogs with him. He means to drive the sheep in the direction of the gate: but the sheep run in the very opposite direction and are crowded together in a corner there, having never moved at all in the direction of the gate, when C and D somewhat prematurely come forward and seize A. Here as the sheep have not begun to move in the direction in which A wished them to go, A is not guilty of theft. Or supposing they had in fact so moved: C and D may be quite unable to establish it: for their attention may have been on A not on the motions of the sheep so particularly as to say positively in what *direction* they went.

Of criminal misappropriation of property not in possession. A defective definition of the Law of theft occasions this separate class of offence. The definition stoops to things special, peculiar, and accidental, it is not based exclusively on the general character of such property as is fit to be the subject matter of a Law of theft, which ought to embrace all property in its nature, the fit subject matter of a Law of theft; and to disregard special circumstances as to the right to particular things *in respect of ownership or possession* in the particular instance. A Law of theft would be much too narrow, which embraced nothing that was not in strict actual possession.

The Code admits constructive possession to some extent. When the unmeaning distinctions to which a narrow rule gives rise, are fully considered, I think the inexpediency of it will be apparent. It may be very necessary in order to ascertain *quo animo* an act of taking was done to consider special and particular circumstances applicable to a particular property, to a particular possessor, to a particular owner; and it may be necessary to have some regard though not a rigid regard to them in procedure with a view to ensure requisite precision and certainty.

The Code contains no clear exposition of the extent to which it is proposed to narrow in its practical application "constructive possession"

under the Law of theft. This is a very objectionable want of certainty; and it appears to me that if the Code were applied throughout India, it would very probably not have an uniform operation in places where the English Law prevailed and in cases where that Law did not prevail: for ownership and possession are not necessarily the same thing under different systems of Law: and the Code lays down no direction generally on this important subject. I forbear to pursue this as it would make my observations too lengthy if I were to pursue it. I shall take for the principle of illustration only one case of possession, which is treated as vacant possession in the Code, viz. that consequent on the death of a late owner. The intention to narrow the Law of theft on this head of constructive possession is evident from the very existence of this distinct class: and the remarks in the notes on Mr. Livingstone's definition of theft furnish additional evidence of such intention: his definition is this "The fraudulently taking of corporeal personal property having some assignable value, and belonging to another, from his possession, and without his assent." He subsequently says "neither the ownership of property, nor the legal possession of property is changed by theft alone, without such circumstances as are required by the Civil Code, in order to effect a change of property." The writer of the note in question applies the *reductio ad absurdum* to Mr. Livingstone's propositions. Mr. Livingstone had said that goods stolen by one thief, and stolen from him again by another thief, must be said to be taken by this last out of the *original owner's possession*, meaning thereby *legal* possession: Mr. Livingstone's definition of theft would not have reached this second theft otherwise: for the goods in the actual possession of the first thief would not be goods *belonging* to him. But the writer of the note, commenting on this, and speaking of possession as meaning actual and not legal or constructive possession, says in substance, then if the goods were not in the possession of the first thief, but of the owner, the owner could not have had them taken from his *possession*, and therefore the first thief could have committed no theft at all and this absurd consequence would have rightly resulted, if Mr. Livingstone had been writing of actual possession; but it results not at all from his use of the word possession as *legal* possession: I should not have thought it necessary to notice this erroneous criticism on Mr. Livingstone but for the evidence it furnishes of an intended limitation of constructive possession, one would infer from it that it was intended to say, possession of the owner is divested by theft, and such goods are out of possession, if the thief desert them. But the Code throws no further light on the subject. It establishes constructive as actual possession in the case of a father, husband, guardian, &c. in certain cases, and why should it not then recognize the constructive possession of a late actual possessor of things stolen from him. It is to be regretted that so little light is thrown on

the subject. It appears, however, clearly from Section 385 of this Chapter, that in some cases of death the mere fact of death would cause property to be "not in possession."

Let us consider the reasonableness of a distinction founded on this circumstance. Death alone cannot in the majority of cases lead any person to suppose property to be unowned. I speak not of actual vested property in point of Law, but of beneficial interest. If a death renders property more subject to plunder that is a reason why the Law should give such property a greater protection, not a reason why the spoliator should be visited with a minor degree of punishment. The distinction is not recognized by the usage of communities. Death in this country is often very sudden, and intestacy more frequent than elsewhere. But the succession is in most cases clear: though the presons entitled may not be immediately at hand. Where the English Law prevails, no abeyance either of property or possession is occasioned by a mere death. A, a merchant of Calcutta, trading alone, has property of various kinds and to a large amount in his hands, some his own absolutely, some specially with an interest, some special as mere agent for others without interest of any kind in himself: some of his constituents are abroad. He is taken suddenly ill and dies of cholera after a few hours' illness and intestate. At the time of his death his Butler has charge of his plate, it is in the plate chest securely fastened, the Butler having the key, &c., other property of his own such as books, furniture, ornaments, &c., is in no particular possession: other property of his own is in his counting house, godowns, desk, &c., and much of it not separated from that of his constituents in the same place. By his sudden and unexpected death, all the property would become under the Code instantly not the subject of theft, unless a distinction were to be made between that with the Butler and that in which the deceased had not either the general property or a special property coupled with an interest. Now let it be supposed that some person taking advantage of the confusion into which all might be thrown by the death, should steal some property of each description, to what questions might not one and the same taking give rise? As to the plate it might be theft, because the Butler might be deemed in actual possession: as to other things criminal misappropriation. But as to the foreign owners: what is it? Death has removed *the agent* the only actual possessor, are they or are they not to be said to be in possession? By the general Law of most countries, mere personal goods are considered as not having locality: and it is so by the English Law: these goods therefore would properly be said to be in the possession of the owners, and not to be vacant goods in any sense of the term. What the Code means is not clear as to goods so circumstanced: but according as the real meaning might be construed to be, the case would be either one

of theft or one of misappropriation. So that the same man being tried for the same act of taking, might be considered as thief, and as criminal misappropriator according to the status of particular things.

ILLUSTRATION.

A, is a thief, B is a policeman, watching A's proceedings unknown to A, C is walking in the street, and A is intending to pick his pocket, C suddenly falls down dead in the street, several persons run up and find him dead, A is amongst them. The policeman suspects him, and goes up and arrests him, and finds upon him a purse containing money which is identified as that of the deceased man, which he is proved to have had in his pocket very shortly before: if A picked C's pocket one moment before C expired, A is a thief: if he picked C's pocket one moment after, a criminal misappropriator. It is not unimportant to ascertain which he is, for his punishment may be greater as a thief than as a criminal misappropriator, and he may deserve the most severe punishment which the Law allows in theft. To bring him within Section 385, and justify the higher punishment might not be so easy for it would not be easy to prove in a Court of Justice, that the offender *knew* that the man was dead; though the fact of the death may be clearly proved. When two commit an offence together, one may know that the man on whose property the offence is planned between them is dead: the other may not know it, through mere accident. Yet that accidental circumstance may make a difference of twelve months in their punishments.

ILLUSTRATION.

If A abets B to *steal* C's goods: and C die between the abetment and the taking: and B in pursuance of the abetment takes the goods, but neither of them knows that C is suddenly dead, and his goods "out of possession," then A may escape with a much lighter punishment, though the real instigator to and cause of the offence: for he will be liable to a minor punishment only under the Law of abetment in this Clause, the offence abetted not having been committed. The Code makes the offences different offences, and if a different offence from the abetted offence be committed, then the abettor is not answerable for the committed offence, unless one might reasonably be expected to happen by reason of the commission of or attempt to commit the other; but sudden and unexpected death could not reasonably be foreseen, and would, if it happened, have no connection with the offence abetted. It would therefore be punishable only in a minor degree. But let us observe how inconsistent the Code is with itself. If A loses a valuable piece of property, drops it in a journey on the high road, and it presents *a clue*

to the owner, and B finds it on the highway and appropriates it to his own use seeing, understanding and disregarding the clue—he is a thief and as such subject to three years' imprisonment. But if A dies suddenly intestate, and his sole next of kin entitled of right to administer to him lives in the next street, and is known to be such, yet if one plunders the dead man's house instantly on his decease he is not a thief but a criminal misappropriator, though there is a very good clue here. What would be said, in a commercial place like Calcutta generally subject to the English Law, of such strange results. How would it astonish a commercial man to be told that immediately on the death of his partner intestate, all that partner's private property became *bonâ vacantiâ* goods "out of possession," and not the subject of the Law of theft, because he died intestate, that they could not be stolen, only criminally misappropriated until some body or other was put in actual charge of them: If that partner had died leaving in the same desk things belonging to himself and things belonging to the firm, the same successful sweep of the hand of a thief snatching up a heap of valuable things there would make him as to part a thief, as to other part a criminal misapproprietor. Supposing the English Law to give its rule where it prevailed to the ambiguous term possession in the definition of theft in the Code, then people would learn in Criminal Courts of Justice, that if a man died and left a Will appointing Executors, his goods were not, "out of possession" by his death! if he inadvertently or designedly omitted to appoint them, or they died before him, &c., then that his goods were goods "out of possession" at his death. That they were "goods out of possession" if he died intestate. That though a man planned to steal and thought that he had stolen, he would not be a thief, if some accident happened previously, which he cared not about, and which would have had no influence on his act if he had known it. They would hear the above doctrine on the criminal side of the Court as to possession: and on the civil side they would hear the very opposite doctrine laid down, goods "out of possession" for criminal justice, would be in possession for civil justice: and confusion and complexity in the minds of the hearers would be the result. Where that Law prevailed not, the evils would be nearly as great. No commercial community nor any other community accustomed to transact the ordinary affairs of life would understand the reason or recognize the advantage of such technical and artificial rules. In the common understandings of common men, popular phraseology is better than any legal phraseology: for most purposes of description it answers the end of description much better. Why is not the Agra Bank, or the Union Bank to be said to be in possession; is it more difficult to understand their possession, than to understand the possession of any firm less numerous! Just as a man says my policy of insurance, or says my title deeds are in the hands of Messrs. Eglinton, McClure and Co., or of any

other firm; he says my title deeds are in the hands of the Union Bank: legal estates, names of trustees, &c., are never thought of, and there is no more practical difficulty felt in understanding their constructive possession than in understanding that of an individual master or principal. Under the Code the actual possession is positively set aside and a constructive preferred in the cases of minors, lunaticks in *the keeping* of their guardians, &c &c. Though for purposes of description the real is at least as good as the legal possession. If a lunatick have a guardian in whose keeping he is, then his (the lunatick's) pocket handkerchief in his pocket, and his watch in his fob, are in the possession of the guardian otherwise of himself.

A collection of persons may have no trustees. All their valuables may be placed in the care of their cashier: in that case he would alone have the possession of them. In case of his sudden death or removal, all their valuables would instantly " in the eye of the Law" be out of possession, that is in a criminal proceeding, though in their own strong boxes.

The property of Government or of any large Company may constantly be shifting from the state of " property out of possession" into that of " property in possession" and back again for sudden death is more frequently here than elsewhere the fate of individuals.

CHAPTER XXV.

OF DEFAMATION.

This chapter greatly multiplies criminal offences. People enjoy their reputations in sufficient security in my opinion: and I see no necessity for visiting civilly or criminally the speaking or writing of words conveying no very grave imputations; imputations such as people not excessively thin skinned would consider it silly to notice. I think the true policy lies in the opposite direction, rather to limit than to extend the law as to defamation. Whatever objections the existing English Law in India, as to defamation—(not reformed to the extent to which the same Law is reformed in England) may be exposed to, this Law of defamation would be open to more. It would include a far greater number of trivial imputations, it would be even more vague, it would open a vast field for constructive, or "Judge made Law." It would be more difficult of application in many other respects; not to dwell on the vagueness of such a word as "quarter" so applied, the definition of defamation, viz., "attempting to cause any imputation concerning any person to be believed in any quarter, knowing that the belief thereof would harm the reputation of that person in that quarter," would probably introduce many mischievous results: would introduce fictions and technicalities: and give rise to "Judge made Law." Is the public meant to be included? If so, the words are redundant. If not, defamation made to the public at large would be dispunishable. I cannot conclude otherwise than that this latter species of defamation must be meant to be included in the term "quarter" imputations may purposely be spread for the public, or they may pervade the public contrary to the imputer's real intention; in the first case there might be the total absence of any intention to defame in any individual or particular quarter. In the latter case if the defamation spread contrary to the intent of the defamer some cases might occur, where a most wantonly injured man would be deprived of all redress.

The illustration *g* tends to lead to the conclusion, and is so far objectionable that *the hearers* presumed, or real appreciation of the imputation should principally be regarded in considering its real nature

under the Code in like manner as in considering *the fact of intention*. But *the hearer's* appreciation, real or presumed, of the quality of the imputation is not a proper test, is not made any test; and could not, without great mischief and absurdity, have been made a test of the quality of the imputation. A, intending to defame a Hindoo, says that it is highly probable he will be converted to Mahomedanism. If this is said to Hindoos, relatives of the party "it may be an offence," not if said to a Mussulman. This is in substance the illustration. An imputation affecting *character as to caste*, need not by the terms of the Law be addressed to Hindoos at all. The communication may very well be made to Christians with the intention and knowledge required by the Code. For instance A intending falsely and maliciously to represent B, a Hindoo, as a convert to Christianity; knowing that it will defame him with Hindoos in general, communicates that pretended fact as a real fact to one not a Hindoo, a Christian for instance, a Christian Editor of a Newspaper, with the intention that it should be made known, but without any direction for that purpose, or direct or indirect expression of a wish that it should be promulgated. On the evidence it might well be found however that A attempted to cause it to be believed amongst Hindoos, (a quarter as I understand the Code) that B was a convert to Christianity, knowing that it would defame him with Hindoos. The illustration therefore tends to lead astray by laying undue stress on the religion of the persons immediately addressed. The framers of the Law seem to me to lose sight of one of the greatest evils of defamations, viz. Its secret and untraceable diffusion. It is a blight on reputation of which we trace the fatal effects, but saw not its coming nor marked its progress. The slander seems to burst into day, but it has worked gradually underground often through many unknown and undiscoverable channels. As the utterer therefore of defamatory matter may do irreparable mischief by speaking it, mischief for which no redress may be obtainable, except against him, I think he ought not to be dispunishable merely because he has not an actual intention to defame. He must not lightly throw out imputations which may have a wider range than he dreamt of. A private party of young men assembles for convivial purposes. The conversation chances to fall on Z, a minister of religion. Oh, says A, one of the party—I knew him at College and know him now intimately, and then proceeds to detail some immoral acts which he untruly attributes to the subject of his discourse. B, another of the party, immediately proposes Z's health with commendations on him founded on the story just communicated. It is drunk by all enthusiastically, Z's conduct falsely imputed to him spreads and is talked about. Many believe the story, his congregation become divided upon the subject of his guilt. All agree that he "had better resign," and in his case this is equivalent to removal. He loses his character and his

prospects are ruined. With great difficulty he finds out the origin of the story, and proceeds by criminal process against A. The facts appear as above stated: A's Counsel states that A meant not to defame at all, nor intended to defame in "that quarter," he attempted to cause the matter to be believed in "that quarter," and was unfortunately successful, but he did not *know* that the belief of the imputation would harm the reputation of Z "in that quarter;" on the contrary he knew the result would be very different; as it proved they drank his health, &c.

The Judge sums up thus "no doubt Z has been defamed in fact:" the question is has he been *defamed in Law?*

Gentlemen, if you believe that A knew his company, and that they would receive the story as they did receive it, you must find for the defendant.

Foreman.—My Lord is that the Law?

Judge.—It is.

Foreman.—Then my Lord the worse company a man keeps, the more safe he is in defaming?

The Judge.—Gentlemen, we must not be wiser than the Law, you must find for the defendant.

Verdict for Defendant.—It is to be observed that the Judge could not in such a case direct that the defamer should be presumed to have *intended* the very natural consequences of his act: for that presumption of Law is repudiated. Let it be supposed that in the case above put all but one applauded the conduct and joined in the toast, and that that one alone thought the imputed conduct disgraceful and wrong; but then only *in a minister of religion.* Then two questions would arise: did A know this individual's sentiments? And next supposing him to have had that knowledge is one out of a company of eleven, "a distinct quarter"? The Code directs not on the point. The Judge must "grind a little Law" for the occasion. Is the company generally "that quarter," or is each component individual "a separate quarter?" And may one company of eleven form one aggregate quarter; and eleven or fewer distinct "separate quarters". It is easy to conceive a diversity of opinions on and not easy to come to any satisfactory conclusion, as to the real meaning of the legislature in using so vague a term as quarter, for many things may well be supposed to have escaped their attention. But let us suppose the issue to turn on whether the speaker *knew* the dissentient's sentiments. I can understand one Judge saying; the Law says *know*

not *believe;* it means knowledge in fact; I can fancy another saying he must be presumed to have known; he had no ground to believe the contrary as to this Gentleman, whose sentiments he seems not to have known at all, nor to have taken any pains to know: he must be presumed to have believed, therefore that this Gentleman's sentiments were in accordance with those of the world at large: and knowledge and belief as to another man's belief the legislature probably considered as the same thing." The illustration, which turns on the point of caste is erroneous, it can only be defamatory as involving depreciation of character as to *caste* in the words of the explanation: "lowering the character in respect of *caste*," but saying *falsely of a Hindoo*, that it is *highly probable* that *he will* be converted to another religion, could not lower *his character* in respect of *caste*, which is in its very nature character as to an existing status. Many unforeseen accidents may make any Hindoo lose caste: or be in danger of losing it: a belief amongst Hindoos, that a man will lose caste has no necessary connection with such event, nor necessarily brings the consummation nearer. If this illustration be judicially recognized as a true definition of lowering character in *respect of caste;* then caste must have the universal acceptation of caste not as it is, but caste unalterable: and imputations of caste lost and caste endangered must be considered as equivalent imputations. I understand "character as to caste" to mean, "reputation enjoyed as to caste," that is that a man *is* of such and such a caste, is not put out of his caste: not to mean reputation that he will be unchangeably in his caste, for fifty things may make a man lose his caste against his intention, and with no fault in him. Let one say of a Hindoo to another Hindoo of A to B, A will lose caste next week: X and Y mean to pollute him so and so, that would be no imputation on his character as to caste. It is the same thing if it be said next year he will turn Christian.

The latter being a fault in him in the opinion of Hindoos, is nothing to the purpose. The opinion among Hindoos of his degraded state on that event cannot anticipate that event, and make his present status as to caste, different from what it is, their opinion on his moral character as being affected by the change would deservedly go for nothing. The loss is loss of character as to caste, not loss of moral character. The introduction of the words "relatives of Z" in addition to its own vagueness might give rise to a doubt, whether limitation to some special description of Hindoos was intended or not as essential. "Lowering the intellectual character of a person." It would appear as though I were desirous of throwing ridicule on the Code, if I were to give instances of the trivial imputations which would be criminally and civilly the subject of suit under this head. "Lowers the character of a person in respect of his calling."

An imputation of cowardice whom does it lower *in his calling*? The illustration mentions "Soldiers" and contrasts them with "*women.*" But it is not said, that it is defamation to call men in general cowards, "moral cowardice" imputed may be an imputation on *moral character*; but in what particular *callings* is want of courage or disqualification? The Judge must here "grind" his own Law.

Is it an imputation on a man milliner, on a tailor, on a mercer, on a lawyer, on a minister of religion, on a physician, on a game keeper, on a watchman, on a durwan, on a policeman, on a coachman, on a grqom, on a butcher, on a mariner, &c., on which? and why on this, and not on that person? Here is ample field for judicial interpretation. The Judge would also have to decide on what *should lower* moral character as distinguished from what in fact might have done so in the quarter addressed and intended to be unfavourably impressed, for the Code does not make the opinion of the hearer of the defamation conclusive on the real moral quality of the imputation nor could it reasonably do so, and it leaves the Law on this point quite as vague as it finds it, but gives this vague Law a far wider range.

The Code would certainly furnish fresh ground to a Judge, who liked making his own Law.

Legislators disguised as Judges are rather cramped now.

Just as modern poets and wits find that all the best things have been said, and complain of their hard fate, so a Judge now finds in existing systems almost on every point a decision or a dictum: and he must make Law by first unmaking it, if his talents be of the legislatorial kind. "The Code says a collection of persons cannot be defamed as such," but it does not define how many individuals go to form a collection, no reason is assigned for introducing this "fiction and technicality."

If A says such a company is insolvent, if he speaks of a partnership with limited liabilities, he does not predicate insolvency necessarily of any individual: but simply of the aggregate or collective body, the partnership. Collections of persons as well as corporations are readily viewed as a great individual. A collective body having a common designation and having a common fund liable to the extent of that common fund only, and not liable collectively or individually beyond, might exist here as it exists elsewhere.

What propriety can there be in saying that one who asserts in fact and falsely of such a *body* that the *body* is insolvent; asserts that only *in fact* and not *in Law*, and that *in Law* he must be taken to speak of

the individuals as individuals of whom he may know nothing; and to whom he may mean to impute nothing. The result would be that he would be dispunishable in some cases, for he might not thereby lower the commercial credit *of any person*, but only that of the collective body: which could not under the Code be defamed: each man's share might be but 50£: they might be allowed to hold only five shares each. They might be persons to whom 250£ more or less would be of little consequence: and on whom the imputation of such loss would bring no diminution of their commercial credit: neither could it be said to lower the character of each individual in *his calling:* and so in some cases bodies might be defamed in fact with impunity.

Imputations on *bodies*, are not necessarily imputations on *every* individual forming that body.

Must every man sue to prevent such evasive defences as that the particular plaintiff or plaintiffs was or were not aimed at?

If this be allowable it must be because the scandal hits the whole body; that the whole body is defamed. It seems to me to be quite as rational to say that a body cannot be plundered, as to say that it cannot be defamed. Would there be any propriety in exposing a defamer to five hundred actions instead of one—and if for the five hundred actions one should be permitted by the Code of procedure then the Code of procedure would virtually abrogate the principle, and be at variance with the Code of substantive Law.

"An imputation, which is defamatory when directed against one person, is not necessarily defamatory when directed against another." This is true: But it is left entirely to the Judge to assign limits to this exception. He will have an open field—whereon to make Law "A says of Z that Z drinks wine." It *may* turn on the question whether Z is a *Mussulman* or a *Christian*. May it not turn also on what sort of a Mussulman A is known to be. It cannot be meant that if Z be a Mussulman, in any sense it is necessarily defamatory of him to say that he drinks wine, supposing the co-existence of the required intention and knowledge, and an appropriate quarter. The Antithesis Christian to Mahomedan might convey that impression—so serious a matter should not be left in the slightest doubt. It involves a principle of vast importance in the consideration of the meaning of the Law as to defamation, which relates to imputations "lowering *moral* character."

Let it be supposed that the accused offers to prove that the Mussulman on whom the imputation was cast, though a Mussulman by profes-

sion, thought that it was no sin to drink wine in moderation: that he made no secret of his opinions: that both the speaker and the hearer knew of them, and that the defence was rested on this, that in fact nothing lowering moral character was imputed by saying though falsely that the Mussulman had acted up to religious opinions conscientiously entertained and openly professed by him, by doing a thing innocent in itself though condemned by those of a particular creed, to which creed he belonged. Would such proof be admissible, and what would be its effect if received? This question affects men of all religions, viz., whether the character of one professing a particular creed ought to be lowered by imputing to him opinions conscientiously entertained and acted upon by him, which though at variance with the received opinions of the general body professing his creed are in his own opinion reconcileable with that creed, the imputation conveying no charge of opinions or acts abstractedly wrong, nor his conduct evidencing any hypocrisy, or falsehood, or simulation, or dissimulation. It is not even hinted at in the Code that belief on religious subjects constitutes morality; or the want of it immorality. As a general rule it would be impossible to state such a doctrine in a Code for people of many totally different religions without selection of some one, nor does the Code even hint at immorality in entertaining Latitudinarian opinions as to particular doctrines of a particular creed with a general assent to the main doctrines of the whole: nor even hint at such a doctrine as that the sense of the community of persons professing the same creed, must govern. I collect from the Code a different view of this subject though I admit that it is not explicit; but if any colour exist for even a doubt it is the fault of an *illustration*. The Code says there must be an intent to lower moral character: to lower it by matter of imputation which the utterer knows will if believed in "that quarter" harm the reputation in "that quarter." It has used the words "any imputation," but it corrects their vagueness by a definition—of what is said in the Code to harm reputation. It does not make this rest on the folly, prejudice or ignorance of the hearer: but it carefully drops here, the words "that quarter" and all allusion to them and uses a general definition. It is the same with intellectual character—no such absurd limitation is intended.

Nothing of the kind is said in the Code itself, though four of the illustrations, viz. *d. e. f. g.* might occasion error on the point: from the general and vague character of all and the false antithesis in two.

It is very clearly and properly enuntiated in the Code that what may defame one may not defame another, the tendency of the words may vary as the subject of them. It defames the moral character of a true Mussulman to say he drinks wine (a thing innocent in itself when

not abused) why does it so? Because that imputation not only when addressed to Mahomedans, but also when addressed to other people, (and the illustration properly says spoken of, and does not add *to* a Mahomedan) represents a man acting against what he considers to be the Law of God, and disobeying its commandment as he thinks; and violating his own notions of right. But none of these reasons apply to the moral conduct of a Mussulman drinking wine, being a Mussulman to some extent, yet wanting belief that wine is prohibited by God: and deeming drinking wine simpliciter by itself without excess as innocent as drinking water.

The Law and not the Judge ought to define what the Law means by imputation lowering moral character, for men entertain widely different notions on the subject.

First Exception.—It is not defamation to attempt to cause any thing which is true to be believed in any quarter, concerning any person. Does this mean that no one is defamed, by another simply relating of him, a bare fact which is true. Or does it mean to give less ample protection of the defamer than this, and if less what are the limits? A says of B, B was convicted of theft at such and such a place and time and before such a Court—intending to defame B, knowing at the time that B's innocence was afterwards clearly demonstrated, and that B was pardoned, and his prosecutor afterwards convicted of a malicious prosecution for that very prosecution; but maliciously suppressing all mention of these circumstances. The facts stated are strictly true in themselves. But a fact is purposely placed in a false light with an odious malignant premeditation of injury by falsehood, viz. to convey an impression not simply of conviction of theft, but of the guilt of theft.

If the attempt is to cause guilt to be believed it is defamation in fact at the least.

If the attempt is to cause *conviction* without guilt to be believed it is not even defamation in fact, would the case proposed be defamation in Law under the Code. I certainly think so. But the words admit of some latitude of construction.

I am glad to find that the present Law Commissioners disapprove of the Code on this point and propose in their 2d Report the same limitation on the right to publish defamatory matter of an individual, which is contained in Lord Compell's Libel Act, and therefore as, I agree with them, I shall pursue this subject no further.

CHAPTER XXVI.

This Chapter on intimidation, insult and annoyance, which is intended to be supplemental to that on defamation is framed so as not to include several modes by which the most dreadful injuries to the feelings might be inflicted, for intimidation might be entirely out of the question.

It might not be intended to insult the individual though his feelings might be deeply hurt and outraged, it might be malice aimed at another; supposing the intent to be to insult the individual still the act might be committed neither by uttering any *word* or making any *sound* intending that such *word or sound shall be* heard, or by making any gesture, or exhibiting any object intending that such *gesture* or object should be seen &c. *by that person*, in short the limitations as to intention and the modes of doing the thing, as to the identity of the person to be insulted and annoyed with that to whom the word, sound, gesture, or object is to be so expressed, made, or addressed directly, would make it easy to evade the provisions of this Chapter, and so to ensure a practical impunity for detestable malignity. The Code contains no distinct Chapter including offences against public decency. The limitation as to exposure of person that it must be done with intent *to insult the modesty of a woman*, is too narrow. There is no reason why this offence should be limited so as to be capable of being committed only against the modesty of women. Men may expose their persons obscenely so as to insult the modesty of their own sex, their modesty, their sense of decency and without intending to excite to unnatural lust. Women may expose their persons obscenely to men and boys to insult their modesty, and outrage their sense of decency. There may be gross violations of decency by exposure of a man's person committed by man and woman with no intention to insult the modesty of any woman—still less with the intention of insulting that woman to whom the exposure is made. A curious instance of the defect of a Law somewhat similarly worded occurred several years ago under the Vagrant Law then in force in England, but the indecency of the particulars forbids my detailing them.

MILITARY ORPHAN PRESS.